IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 51 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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M/S. ACE TOURS - Petitioner(s)
Versus
SAHAJANAND MEDICAL TECHNOLOGIES PVT. LTD. - Respondent(s)

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Appearance :
NANAVATI & NANAVATI for Petitioner(s) : 1,
MR DHAVAL D VYAS for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 01/05/2007

ORAL JUDGMENT

1. Present Company Petition is filed by the petitioner – M/s. ACE Tours under Sections 433 and 434 of the Companies Act, 1956 for an appropriate

order of winding up of M/s. Sahajanand Medical Technologies Pvt. Ltd. contending *inter alia* that the said Company is indebted to the petitioner to the tune of Rs.25,63,404/- as on 20th September, 2006 and in spite of statutory notice, the respondent – Company has neglected to pay the said amount and is unable to pay the debts and it has lost its financial substratum.

2. It is the case on behalf of the petitioner in the Company Petition that the petitioner is a reputed tour operator and is engaged in conducting domestic and international tours apart from arranging tickets. It is submitted that the respondent – Company entered into agreement dated 12th October, 2004 with the petitioner to arrange a conference at Dubai on 2nd February, 2005 to 5th February, 2005 for its invitees. It is further submitted that apart from this conference at Dubai, the petitioner was also providing services of ticketing to the Company. It is also submitted that the Company also used the services of the petitioner for the Europe trip organized by it and for Europe trip of the Company, the petitioner arranged for tickets and hotel

arrangements. It is submitted that even though the Conference at Dubai was to complete on 5th February, 2005, some of the invitees of the Company overstayed and for that the petitioner raised further bill on 11th March, 2005. It is also submitted that thereafter the petitioner followed up with the respondent – Company for its outstanding dues and a meeting between Mr. Raju Chokshi on behalf of the petitioner and the Directors of the Company was held on 3rd June, 2005. It is further submitted that upon discussion, the Company raised certain queries vide its letter dated 4th June, 2006 seeking original invoice with respect to Conference at Dubai. To this letter, the petitioner promptly replied by letter dated 06th June, 2005 to the satisfacation of the Company. It is further submitted that the petitioner wrote three letter demanding payment of the outstanding dues, letter dated 19.07.2005 and 15.09.2005. It is submitted that the denial of the debt by the Company is an afterthought as earlier the Company has issued letters of satisfaction for the services rendered by the petitioner. It is submitted that thereafter, the petitioner served legal notice

to the Company on 1st April, 2006 and in spite of the said notice, there was no reply by the Company, therefore, the petitioner served final notice on 20th September, 2006. It is submitted that the Company has never disputed its debts before 27th November, 2006. It is submitted that reply dated 27th November, 2006 is nothing but an afterthought and the contentions thereof are denied. It is submitted that the Company is indebted to the petitioner to the tune of Rs. 25,63,404/- as on 20th September, 2006 and non-denial of the debt coupled with the fact that the Company is neglecting in its payment, the only conclusion the petitioner can make out is that the Company is unable to pay its debts and it has lost its financial substratum. Therefore, it is requested to pass an appropriate order of winding up.

3. The petition is opposed by the respondent. Affidavit-in-reply is filed on behalf of the respondent-Company. It is submitted in the reply that the respondent-Company is carrying on the business of manufacturing the coronary stents since 1999, which is unique machine / instrument / support, which is the sole creation and invention of the present

respondent-Company. It is submitted that the respondent – Company is the first Asian Company to have undertaken such venture and is the only Company within the Asian Sub-Continent to manufacture such article / stets. It is submitted that the product which has been manufactured by the Company is a unique life saving product which has created a revolution in the cardiac related problems. It is submitted that the total stents sold by the petitioner Company are more than 30,000 annually in number and the Company is expecting to have a stronger roll over of the future sales and the sales of the stets in number is likely to cross over 75,000 annually. It is submitted that the total audited sales of the respondent – Company in the year 2003-04 was approximately Rs. 16,58,000/- (Rupees Sixteen Crores Fifty Eight lacs and the Company had paid income tax of Rs. 19 lacs and had employed approximately 70 persons. It is submitted that net assets were approximately Rs. 10,41,00,000/- (Rupees Ten Crores Forty One Lacs). It is submitted that for the year 2004-05 the Company's audited sales was approximately Rs. 34 Crores wherein the Company had

paid Rs. 44,71,000/- of Income tax and that the next assets of the Company was Rs. 13,97,00,000/- approximately. It is further submitted that for the year 2005-06, the Company has further progressed and the total audited sales were around Rs.49,71,00,000/- approximately wherein the Company had paid Rs.3,68,00,000/- of the income tax and the net assets of the Company was approximately Rs. 21 Crores. It is submitted that the Company is yet to file its final audited returns for the year 2006-07, the provisional figures of the total sales are approximately Rs. 64 Crores wherein the Company has already paid approximately Rs.2,55,00,000/- as advance tax. It is further submitted that today the Company has employed approximately 180 persons and is in further progress of employing 100 more persons by the end of the coming year. Thus, it is submitted it cannot be said that the Company has lost its financial substratum and/or neglected to pay debts/dues to its creditors.

4. So far as the merits of the case is concerned, it is submitted that though it is mentioned in the petition that there was no reply to the statutory notice, in fact the respondent had

replied statutory notice vide reply dated 21.10.2006. It is further submitted that the respondent Company had relation with the applicant since year 2000 and that the Company has fully paid the bill amount of Rs. 1,58,00,000/- to the applicant for its services in the year 2002 and that in the year 2003, the respondent Company has fully paid the bill amount of Rs. 85 lacs approximately to the applicant Company for its services. It is submitted that the Company has also paid Rs. 6,22,75,000/- (Rupees Six Crores Twenty Two Lacs Seventy Five Thousand only) to the applicant Company for the financial year 2004-05. It is submitted that the respondent Company had organized a medical event at Dubai for which the applicant was engaged for managing the event and transaction was entered into by the applicant and the respondent Company by way of written agreement. It is submitted that there was booking requested for 594 persons which also included the travels from India. It is submitted that the persons traveling from outside India were only to be managed with their accommodation and other ancillary services. And it was agreed that no ticket bookings were to be

undertaken by the applicant for international travelers. It is submitted that though overall services handled by the applicant was satisfactory but there were certain issues which were brought to the knowledge of Shri Rajubhai Chokshi, the partner of the applicant and the issues included to and fro services, the food facilities, under booking of rooms etc. It is submitted that even these issues were sorted out in the personal meetings between the parties and it is submitted that surprisingly, in spite of the clear cut written contract, the applicant vide its Invoice dated 9th February, 2005 had over billed certain items and additional supplementary bills were given as revised on 31.05.2005. It is submitted that same were objected by the respondent Company and that Mr.Rajubhai Chokshi had time and again was requested for providing the details and explanation with regard to the over billed amount. It is further submitted that further meeting was held with Shri Rajubhai on 03.06.2005, wherein it was understood that Shri Rajubhai Chokshi shall provide with the details regarding the expenses which were raised by the

applicant relating to the Dubai event. It is submitted vide written communication dated 4th June, 2005, the Chairman of the respondent Company addressed a letter to the applicant which was duly received by them on the same day in the evening. It is submitted that by the said correspondence, specifically details have been asked which were 32 in number. However, the same was vaguely replied by the applicant vide its correspondence dated 6th June, 2005. Detail reply has been filed on merits disputing the debts and the liabilities for the above bill. Therefore, it is requested to dismiss the present petition.

4. Heard the learned Advocates appearing on behalf of the respective parties.

5. Now considering the petition, affidavit-in-reply and affidavit-in-rejoinder, documents along with the petition, it appears that the debt is not admitted by the respondent and there are disputes with regard to liabilities. There were correspondence between the parties after the bill and revised bill with regard to certain disputes. It is also required

to be noted that the respondent Company had relation with the applicant since year 2000 and that the Company had fully paid bill amount of Rs. 1,58,00,000/- to the petitioner in the year 2002. In the year 2003 the respondent Company has paid Rs. 85 lacs to the petitioner. In the year 2004-05 also the Company has paid Rs. 6,22,75,000/- (Rupees Six Crores Twenty Two lacs Seventy Five thousand only) to the applicant Company. Even with regard to tour and bills in question except disputed account entire amount has been paid. Considering the affidavit-in-reply that in the year 2004-05, the Company's audited sales were approximately Rs. 34 Crores wherein the Company paid Rs. 44,71,000/- of income tax; that the net assets of the Company were Rs. 13,97,00,000/- approximately; that for the year 2005-06, total audited sales were around Rs. 49,71,00,000/- approximately wherein the Company had paid Rs. 3,68,00,000/- of income tax and the net assets of the Company were approximately Rs. 21 Crores, it is submitted in the affidavit-in-reply that as per provisional figures total sales are approximately Rs. 64 Crores wherein the Company has already paid Rs. 2,55,00,000/- as advance tax and

that the Company has employed approximately 180 persons. Now considering the above, it cannot be said that the respondent Company has lost its financial substratum and is not in a position to pay debts to its creditors and for which the Company is required to be ordered to be wound up. Even otherwise as stated above there are bona fide disputes and debt is not admitted.

6. In the case of ***Pradeshya Industrial and Investment Corporation of Uttar Pradesh Vs. North India Petro Chemical Ltd. and Another***, reported in (1994) 3 SCC 348, the Supreme Court has held that, ***"A debt for the purpose of Section 433(e) of the Companies Act must be a determined or a definite sum of money payable immediately or at a future date."*** In the said Judgment, the Hon'ble Supreme Court considered the following observations of the Hon'ble Supreme Court made in ***Madhusudan Gordhandas and Co. [1972] 42 Comp. Cases 125;***

> ***"Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has***

dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See London and Paris Banking Corporation, In re [1875] LR 19 Eq.444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Brighton Club and Norfolk Hotel Co.Ltd., In re [1865] 35 Beav. 204).

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chhoses not to pay that particular debt. (See A Company, In re [1894] 94 SJ 369; [1894] 2 Ch 349 (Ch D)). Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely. (See Tweeds Garages Ltd., In re [1962] Ch 406; [1962] 32 Comp Gas 795 (Ch D)). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends.

Another rule which the court follows is that if there is

opposition to the making of the winding-up order by the creditors the court will consider their wishes and may decline to make the winding-up order. Under section 557 of the Companies Act, 1956, in all matters relating to the winding-up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered, though, perhaps, the court may attach greater weight to the views of the creditors. The law on this point is stated in Palmer's Company Law, 21st edition, page 742, as follows :

"This right to a winding-up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some goods reason, they object to a winding-up order, the court in its discretion may refuse the order.'

The wishes of the creditors will, however, be tested by the court on the grounds as to whether the case of the persons opposing the winding-up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding -up order is made. It is also well-settled that a winding-up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case. (See P & J. Macrae Ltd. In re [1961] 1 All

ER 302; [1961] 31 Comp Cas 424 (CA).”

It is beyond dispute that the machinery for winding up will not be allowed to be utilized merely as a means for realising its debts due from a company. In Amalgamated Commercial Traders (P.) Ltd. vs. Krishnaswami (A.C.K.)[1965] 35 Comp Cas 456, 463 (SC) this court quoted with approval the following passage from Buckley on the Companies Acts, 13th edition, page 451 :

“It is well-settled that a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed, and under circumstances may be stigmated as a scandalous abuse of the process of the court.”

7. Similar view has been expressed by the Hon'ble Supreme Court in the case of ***Mediqup Systems Pvt. Ltd. v/s. Proxima Medical System GMBH*** reported in ***(2005) 7 SCC 42*** and the Hon'ble Supreme Court has observed that, *An order under section 433(e) of the Companies Act, 1956 is discretionary. There must be a debt due and the company must be unable to pay it.* It is further observed that, *A debt under this*

section must be a determined or definite sum of money payable immediately. It is also held that if the debt is bona fide disputed and the defence is a substantial one, the court will not pass an order of winding up the company. The Division Bench of this Court also in the case of ***Tata Iron & Steel Company Ltd. v. Micro Forge (India) Ltd.,*** reported in (2000) 2 GLR 1599 has laid down certain general principles in a case of winding-up proceedings and after considering various decisions of the Hon'ble Supreme Court, more particularly in the case of ***Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries Pvt. Ltd. [supra]; Harinagar Sugar Mills v. Court Receiver, H.C. Bombay, AIR 1966 SC 1707; Pradeshiya Industrial & Investment Corporation of U.P. vs. North India Petrochemicals Ltd. 1994 (3) SCC 348,*** the judgment of the learned Single Judge of this Court in the case of ***American Express Bank Ltd. v. Core Health Care Ltd. 1999 (96) Comp.Cases 841;*** and another decision of this Court in the case of ***Ashok Fashions vs. Magdoot Acid & Chemicals (Guj.), 1998 (91) Comp.Cases 655,*** the order passed by the learned Single Judge admitting the winding up petition came to be set aside by holding that when there exists

bona fide disputes and the dues are not admitted the winding-up petition is required to be dismissed.

8. Under the circumstances, when the debt itself is disputed and that considering financial position, it cannot be said that the respondent Company has lost its financial substratum and under the circumstances, present Company Petition is not required to be admitted. The respondent Company is going concern and therefore, it cannot be said that the respondent Company has lost its financial substratum. Hence, this petition is dismissed.

[M.R.Shah, J.]

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